Orig.

RECEIVED
JUN 23 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

_____, Term, 1980

NO. 79-6820

JOHN E. BRACKETT,

Appellant,

Vs.

W. J. ESTELLE, JR.,

Appellee.

MOTION TO PROCEED IN FORMA PAUPERIS

Appellant John E. Brackett seeks to appeal in forma pauperis from an order entered in the United States Court of Appeals for the Fifth Circuit on the 24th day of April, in case No. 80-8127, and states the following:

I am without funds to pay court costs or filing fees or to give security therefore.

I believe I am entitled to the redress I seek.

The nature of the case, stated briefly, is: I sought habeas corpus relief in Federal District Court, after duly exhausting state remedies, on the grounds inter alia that the charge of my indictment is so multifarious as to deny me the right to intelligently enter a plea. The federal District Court denied relief without addressing the issues raised and afterward denied leave to appeal in forma pauperis. I sought leave to appeal in the United States Court of Appeals for the Fifth Circuit and leave was officially denied on April 24th, 1980. The latter is the order I seek to appeal from.

John E. Brackett
John E. Brackett, Affiant

Before me, the undersigned authority, personally appeared John E. Brackett who, being first duly sworn, subscribed to the above statement on this 5 day of June, 1980

C. D. BURSON
NOTARY PUBLIC

C D Burson

RECEIVED
JUN 23 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

_____, Term, 1980

NO: 79-6820

JOHN E. BRACKETT,

Appellant,

VS.

N. J. ESTELLE, JR.,

Appellee.

JURISDICTIONAL STATEMENT ON APPEAL
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE UNITED STATES SUPREME COURT:

Appellant John E. Brackett, respectfully appeals from the order entered in the United States Court of Appeals for the Fifth Circuit on the 24th day of April, 1980, in which Appellant was denied leave to appeal in forma pauperis and certificate of propable cause to appeal from a denial of habeas corpus relief in the United States District Court for the Northern District of Texas, at Amarillo, Texas, on the 21st day of January, 1980.

ORDER BELOW

The Court of Appeals denied certificate of probable cause and leave to appeal in forma pauperis on the 24th day of April, 1980, without written opinion. A copy of the order is attached hereto as Appendix B.

JURISDICTION

The proceeding began in Federal District Court after petitioner had duly exhausted his remedies in state court pursuant to 28 USC §§ 2254. The District Court denied relief and appellant sought to appeal in forma pauperis pursuant to 28 USC §§ 1915 and Rule 22 of the Federal Rules of Appellate Procedure. This court has jurisdiction under 28 USC §§ 1254 and 2101. Forsyth Vs. Hammond, 166 U.S. 506.

QUESTIONS PRESENTED

Where the issues raised in the habeas corpus action have not been addressed by a judge of any court since the finding of fact entered by the state trial court, does the denial of relief offend the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution by denying an indigent petitioner the use of the appellate process?

STATEMENT OF THE CASE

Appellant was convicted in the 316th Judicial District Court of Hutchinson County, Texas, for Theft by check, upon a plea of guilty on October 6, 1978. Appellant sought habeas corpus relief in the trail court on the grounds that the indictment charged more than one offense in a single sentence and contained an element of Theft that was not supported by the evidence or Appellant's plea. That is, the act shown to have been committed does not constitute the offense charged, in that although Appellant entered a plea of guilty he took the stand and denied the intent to defraud, an essential element of theft. But, as Appellant has contended, the charge of the indictment was so multifarious as to be difficult, if not impossible, for a layman of ordinary understanding to intelligently enter a plea.

The trial court entered a findings of fact and conclusions

of law, which in essence adopted the respondent's answer to the petition, and the Texas Court of Criminal Appeals denied relief without written order. Subsequently Appellant sought relief in the Federal District Court. The respondent's counsel filed a motion to dismiss, the United States Magistrate issued a findings and recommendation that the motion to dismiss be granted, which recommendation essentially adopted respondent's argument, and the court adopted the magistrate's recommendation and dismissed. Nowhere have the issues raised been squarely addressed by a judge of any court since the trail court's findings.

Appellant sought to appeal from the Federal District Court's order in forma pauperis in accordance with 28 USC §§ 1915 and Rule 22 of the Federal Rules of Appellate procedure and certificate of probable cause was denied by the Federal District Court without a statement of the reasons therefore, contrary to Rule 22, supra, and same was systematically denied by the United States Court of Appeals. See Appendices A & B, attached. Appendix B is the order appealed from. W. J. Estelle, Jr., is the Director of the Texas Department of Corrections and was respondent to the proceedings below only in that capacity. Otherwise, he has no interest in the outcome of this appeal and perhaps the State of Texas is the true party with interest.

CONSTITUTIONAL PROVISIONS INVOLVED

1). The Fifth Amendment to the Constitution of the United States, which provides:

> " No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2). The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

Cl. 1) " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the priveledges or immunities of citizens of the United States; nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

REASONS FOR APPEAL

1). Without this court's intervention, the practice of the Courts below in systematically adopting the states argument in a habeas corpus action defeats the purpose of the appellate process and thereby offends the Due Process Clauses.

FACTS AND ARGUMENTS

The questions orginally sought to be presented on appeal are:

1). Where the act purported to have been commited by Petitioner could have ranged in seriousness from a Class C misdemeanor to a Third Degree Felony, under Texas Law, does the Felony Indictment which incorportes the elements of several statutory offenses in a single sentence of the charge deprive Petitioner of the right to intelligently enter a plea?

2). Where Petitioner entered a plea of guilty, then testified and admitted the elements of passing a worthless check, a Class C misdemeanor, but denied the element of

Felony Theft, as included in the charge, was the trail judge obligated to sua sponte withdraw the plea of guilty?

3). Is the prosecution bound to prove every element of the charge of the indictment when such elements are aggravating circumstances that increase the seriousness of the offense?

4). Did the Federal District Court err in its failure to pass on the issues raised in the Habeas Corpus Petition?

Said questions clearly should be settled by a Federal Court of Appellate jurisdiction. However, where court does not elaborate on the issues, but merely issues an order of denial the purpose of the appellate process is defeated. There is not enough substance to the order of either court below for appellant to research cases in light of possible error. Appeal should be granted and the cause remanded to the United States Court of Appeals for the Fifth Circuit so that a panel of said Court might address the issues.

2). The practice of systematically denying leave to appeal in Forma Pauperis is such a blantant abridgement of the Equal Protection Clause as to call for this Court's power of supervision.

FACTS AND ARGUMENTS

The purpose of appeal in any case is to settle a question of law fairly raised in the court below, by a panel of a superior court, or a superior court en banc, in light of the likelihood of the superior judges, or a majority of them, disagreeing with the lower court. The Federal District Court issued an order denying leave to appeal in Forma Pauperis without giving a statement of the reasons therefore, notwithstanding Rule 22, supra, and the Appellate Court followed suit. An affluent person would

have been allowed an appeal as a matter of course. In the instant case, because of Appellant's poverty, the appellate court is not as accessible to him as to others and the Equal Protection Clause is offended. Black's Law Dictionary, Rev. 4th Ed. at P. 631. Appellant can find no cases in point; there is no opinion of the Circuit Court to research. The case should be remanded.

C O N C L U S I O N

Appeal should be granted and the cause remanded to the United States Court of Appeals for the Fifth Circuit for a panel or the Court en banc to address the questions raised in Appellant's Motion to Proceed on Appeal in Forma Pauperis.

Respectfully submitted,

John E Brackett

John E. Brackett

Certificate Of Service

I, John E. Brackett, hereby state that I have sent by certified mail No: 2923206, postage prepaid, a true copy of the foregoing Jurisdictional Statement, to

Office of the Attorney General
Capitol Station
Austin, Texas 78711 John E Brackett

IN THE UNITED DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF TEXAS
AMARILLO DIVISION

JOHN E. BRACKETT,

Petitioner,

Vs.

CA 2 - 79 - 190

W. J. ESTELLE, JR.,

Respondent

NOTICE OF APPEAL

Notice is hereby given that John E. Brackett, Petitioner above named, hereby appeals to the United States Court of Appeals for the 5th Circuit from the Order and Judgement entered in the above cause on the 18th day of January, 1980.

John E Brackett

John E. Brackett

Appendix A

IN THE UNITED DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF TEXAS
AMARILLO DIVISION

JOHN E. BRACKETT,

Petitioner,

Vs.

CA 2 - 79 - 190

W. J. ESTELLE, JR.,

Respondent

MOTION FOR CERTIFICATE OF PROBABLE CAUSE
AND TO PROCEED ON APPEAL IN FORMA PAUPERIS

Petitioner, John E. Brackett, respectfully moves pursuant to Rules 22 and 24, of the Federal Rules of Appellate Procedure, for a Certificate of Probable Cause and leave to appeal in Forma Pauperis. An affidavit in support of this motion is attached hereto.

John E Brackett

John E. Brackett

IN THE UNITED DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF TEXAS
AMARILLO DIVISION

JOHN E. BRACKETT,

Petitioner,

Vs. CA 2 - 79 - 190

W. J. ESTELLE, JR.,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED ON APPEAL IN FORMA PAUPERIS

I, John E. Brackett, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my Motion to Proceed on Appeal without being required to prepay fees, costs or give security therefor, I state that because of my proverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

1). Where the act purported to have been commited by Petitioner could have ranged in seriousness from a Class C misdemeanor to a Third degree felony, under Texas Law, does the Felony indictment which incorportes the elements of several statutory offenses in a single sentence of the charge deprive Petitioner of the right to intelligently enter a plea?

2). Where Petitioner entered a plea of guilty, then test-

Subscribed and Sworn to before me on this _____ day of _____, 1900/

_____

Notary Public In and For
Houston County, Texas

F I A T

Let the Applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

United States District
J U D G E

ified and admitted the elements of passing a worthless check, a Class C misdemeanor, but denied the element of Felony Theft, as included in the charge, was the trial judge obligated to sua sponte withdraw the plea of guilty?

3). Is the prosecution bound to prove every element of the charge of the indictment when such elements are aggravating circumstances that increase the seriousness of the offense?

4). Did the Federal District Court err in its failure to pass on the issues raised in the Habeas Corpus Petition?

I further swear that the following statements relating to my inability to pay costs of prosecuting my appeal are true.

1). I am not presently employed. My last employment was in April 1978. I was self-employed earning approximately $1500:00 (Fifteen hundred dollars) per month.

2). I have received no income from a business, profession, or other form of self-employment, or in the form of rent payments, interests dividends, or other sources, in the past twelve months.

3). I own no cash or checking or savings account; the amount accredited to my account at the Inmate Trust Fund, at Huntsville, Texas, is $ _____ .

4). I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5). I have no dependents.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

_____

AFFIANT

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FILED

FEB 8 1980

J. E. McELROY, JR., CLERK
By Sharon Shultz
Deputy

JOHN E. BRACKETT,

PETITIONER

V.

W. J. ESTELLE, JR.,

RESPONDENT

CA2-79-190

ORDER DENYING CERTIFICATE OF PROBABLE CAUSE

Petitioner, John E. Brackett, has filed notice of appeal from the judgment entered on January 18, 1980, denying and dismissing his application for writ of habeas corpus and seeks issuance of certificate of probable cause.

Petitioner had challenged the validity of the state court indictment unpon which he was tried. The bases for denial of the application for relief are set out in the Report and Recommendation of the United States Magistrate which was adopted by this court.

Certificate of probable cause is denied.

Petitioner had been granted leave to proceed in the district court in forma pauperis.

Entered at Amarillo, Texas, on this 7th day of February, 1980.

Halbert H. Woodward
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN E. BRACKETT,		
Petitioner,		
Vs.		CA 2 - 79 - 190
W. J. ESTELLE, JR.,		
Respondent		

Appendix B

MOTION FOR CERTIFICATE OF PROBABLE CAUSE

AND TO PROCEED ON APPEAL IN FORMA PAUPERIS

Petitioner, John E. Brackett, respectfully moves pursuant to Rules 22 and 24, of the Federal Rules of Appellate Proceedure, for a Certificate of Probable Cause and leave to appeal in Formal Pauperis. A affidavit in suppert of this motion is attached hereto.

_____

John E. Brackett

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN E. BRACKETT, Petitioner,		
Vs.		CA 2 - 79 - 190
W. J. ESTELLE, JR., Respondent		

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, John E. Brackett, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my Motion to Proceed on Appeal without being required to prepay fees, costs or give security therefor, I state that because of my proverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

1). Where the act purported to have been commited by Petitioner could have ranged in seriousness from a Class C misdemeaner to a Third Degree Felony, under Texas Law, does the Felony indictment which incorportes the elements of several statutory offenses in a single sentence of the charge deprive Petitioner of the right to intelligently enter a plea?

2). Where Petitioner entered a plea of guilty, then test-

ified and admitted the elements of passing a worthless check, a Class C misdemeanor, but denied the element of Felony Theft, as included in the charge, was the trial judge obligated to sua sponte withdraw the plea of guilty?

3). Is the prosecution bound to prove every element of the charge of the indictment when such elements are aggravating circumstances that increase the seriousness of the offense?

4). Did the Federal District Court err in its failure to pass on the issues raised in the Habeas Corpus Petition?

I further swear that the following statements relating to my inability to pay costs of prosecuting my appeal are true.

1). I am not presently employed. My last employment was in April 1978. I was self-employed earning approximately $1500.00 (Fifteen Hundred Dollars) per month.

2). I have received no income from a business, profession, or other form of self-employment, or in the form of rent payments, interests dividends, or other sources, in the past twelve months.

3). I own no cash or checking or saving account; the amount accredited to my account at the Inmate Trust Fund, at Huntsville, Texas, is $ _____.

4). I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5). I have no dependents.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

_____

AFFIANT

Subscribed and Sworn to before me on this _____ day of _____, 1980.

_____
Notary Public In and For
Houston County, Texas

F I A T

Let the Applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
United States District
J U D G E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-8127

U.S. COURT OF APPEALS
FILED
APR 24 1980
GILBERT F. GANUCHEAU
CLERK

JOHN E. BRACKETT,

Petitioner,

versus

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 24 1980
JOSEPH McELROY, JR., CLERK
BY Sharon Faulk
Deputy

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

- - - - -
On Application for Certificate of Probable Cause
and for Leave to Appeal In Forma Pauperis
- - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is Denied

Rubert A. Ainsworth Jr.
UNITED STATES CIRCUIT JUDGE

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By: Deputy
New Orleans, Louisiana APR 24 1980

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED USCAS
June 16, 1980
(confirmed by tel.)

JOHN E. BRACKETT,

Appellant,

Vs.

NO: 80-8127

W. J. ESTELLE, JR.,

Appellee

NOTICE OF APPEAL

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Notice is hereby given that John E. Brackett, above named appellant, appeals to the Supreme Court of the United States from the order entered in this court on the 24th day of April, 1980, denying propable cause to appeal from the denial of relief and leave to proceed in forma pauperis in the United States District Court for the Northern District of Texas entered on the 21st day of January, 1980. A copy of this notice is being served upon Respondent's counsel by certified mail, postage prepaid, at: Office of the Attorney General, Capitol Station, Austin, Texas 78711.

Appendix C

Respectfully submitted

John E. Brackett

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JOHN E. BRACKETT, Petitioner/Appellant,	CA 2-79-190
Vs.	
W. J. ESTELLE, JR., Respondent/Appellee	APPEAL NO: 80-8127

REQUEST FOR CERTIFICATION OF RECORD

TO THE HONORABLE COURT:

JOHN E. BRACKETT, above named petitioner/appellant, hereby states that an appeal is being taken from the order of the United States Court of Appeals for the Fifth Circuit in which certificate of probable cause and leave to appeal in forma pauperis was denied, entered on April 24, 1980, in the above cause. Accordingly, it is requested that the clerk of this court certify and transmit the record of said cause to the Supreme Court of the United States, to which court appeal is being taken, so that said court might have clear understanding of the issues at bar, in accordance with Rule 12 of the Rules of the Supreme Court.

Respectfully submitted

_____
John E. Brackett

A true copy of this request has been sent by certified mail, postage prepaid, to Respondent's counsel, at:

Office of the Attorney General
Capitol Station
Austin, Texas 78711

_____
John E. Brackett
Petitioner/Appellant

COPY

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
DEC 26 1979
2:10 P.M.
JOSEPH McELROY, JR., CLERK
BY ..... Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JOHN E. BRACKETT,

PETITIONER

V.

W. J. ESTELLE, JR.,

RESPONDENT

CA2-79-190

Appendix D

REPORT AND RECOMMENDATION

Petitioner, John E. Brackett, is a state prisoner by virtue of judgment and sentence of the 316th Judicial District Court of Hutchinson County, Texas, in Cause Number 7. On October 6, 1978, petitioner entered plea of guilty to an indictment charging him with the felony offense of theft by check and the trial judge sentenced petitioner to serve an indeterminate term of not less than two years nor more than eight years in Texas Department of Corrections. Petitioner did not appeal the conviction.

He has filed application for writ of habeas corpus pursuant to 28 U.S.C. §2241 et seq. and is proceeding in forma pauperis. He challenges the conviction contending that (1) the indictment is fundamentally defective because it alleges more than one offense in a single sentence and petitioner was unable to intelligently enter a plea to the indictment; and (2) the indictment contains an element that is not supported, but is contradicted, by the evidence.

The transcript of state court proceedings and the statement of facts of the plea of guilty proceeding have been filed as exhibits in this case. Petitioner had filed application for writ of habeas corpus in the trial court, advancing the same contentions which he is raising in the application for federal habeas relief.

The trial judge filed findings of fact and conclusions of law on September 24, 1979 and the Court of Criminal Appeals of Texas denied the application without written order on October 17, 1979. Petitioner has exhausted available state remedies.

The trial judge found that the indictment complies with all requirements of law that existed at the time it was returned and contained all elements necessary to the offense charged. The trial judge also found that the language in the indictment does not charge a second offense, but is descriptive of the offense charged. Those findings are supported by the record and should be adopted by the court.

There is no merit to the challenges advanced by petitioner. The indictment set forth the offense with sufficient clarity and certainty to apprise petitioner of the crime with which he is charged. Certainly there is no defect in the indictment denying petitioner due process which would entitle him to federal habeas relief. In any event petitioner entered plea of guilty to the indictment. His pleadings do not indicate that the plea of guilty was other than knowingly and voluntarily entered. A knowing and voluntary plea of guilty waives all known nonjurisdictional defects, including challenges to the indictment and challenges to the sufficiency of the evidence.

I recommend that the application for writ of habeas corpus be denied.

The Clerk is directed to file this Report and Recommendation and to send a copy of the Report and Recommendation to petitioner and a copy to the attorneys for respondent. Each of them should be advised that he may file written objections to the findings and to the recommendation within ten days after receipt of the

copy of the Report and Recommendation.

Recommended and filed this 20th day of December, 1979.

United States Magistrate

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FILED

JAN 21 1980

JOSEPH McELROY, JR., CLERK
BY: Sharon Gaula
Deputy

JOHN E. BRACKETT,

PETITIONER

V.

CA2-79-190

W. J. ESTELLE, JR.,

RESPONDENT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The Court has reviewed the Report and Recommendation of the United States Magistrate and has considered Petitioner's objection to the Report and Recommendation. The Court adopts the findings of the state trial judge.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Clerk is directed to file this order and to send a copy of the order and of the Report and Recommendation of the United States Magistrate to petitioner, a copy of each to each attorney of record and a copy of each to the presiding judge of the 316th District Court of Hutchinson County, Texas.

ENTERED at Amarillo, Texas,, on this 18th day of January, 1980.

Halbert H. Woodward
United States District Judge

Appendix E

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN 21 1980
JOSEPH McELROY, JR., CLERK
BY Sharon Davis
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JOHN E. BRACKETT,

PETITIONER

V.

CA2-79-190

W. J. ESTELLE, JR.,

RESPONDENT

JUDGMENT

The Court has this day signed and filed an order entitled Order Denying Petition For Writ of Habeas Corpus.

It is, therefore, ORDERED, ADJUDGED and DECREED that the application for writ of habeas corpus filed by John E. Brackett be, and it is hereby, denied and dismissed.

The Clerk is directed to file this judgment and to send a copy of the judgment to petitioner, a copy to each attorney of record, and a copy to the presiding judge of the 316th District Court of Hutchinson County, Texas.

ENTERED at Amarillo, Texas, on this 18th day of January, 1980.

United States District Judge